

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Revocation of the
License of Julianna Porrazzo To
Provide Adult Foster Care under Minn.
R. pts. 9555.5105 to 9555.6265

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above matter came on for hearing before Administrative Law Judge M. Kevin Snell on January 5, 2011, at the Hennepin County Government Center, 300 South Sixth Street, Minneapolis, Minnesota. The OAH record closed at the end of the hearing on January 5, 2011.

Kim Mammedaty, Assistant Hennepin County Attorney, Hennepin County Government Center, Minneapolis, Minnesota, appeared at the hearing as attorney for the Minnesota Department of Human Services and the Hennepin County Human Services and Public Health Department. Jon Geffen, Esq., Arneson & Geffen PLLC, Minneapolis, Minnesota, appeared on behalf of the Licensee, Julianna Porrazzo.

STATEMENT OF THE ISSUE

Should the Department of Human Services' order of revocation of Julianna Porrazzo's adult foster care license be affirmed because a disqualified individual was residing in her day care home?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Julianna Porrazzo ("Licensee") has been licensed to provide adult foster care services for over 25 years at her home in Minneapolis, Hennepin County, Minnesota ("the home"). During that time Licensee has cared for a total of six adult males. Also during that time, Licensee has had no licensing or rule violations, or other licensing issues with the exception of the disqualification of her husband, Darrel Lee Ray, that is at issue in this proceeding.¹

¹ Testimony of Julianna Porrazzo and Michael Kalpiers, Hennepin County Unit Supervisor for Adult Foster Care Licensing.

2. Currently, Licensee provides 24-hour care seven days a week for two male developmentally disabled adults. Licensee has cared for one 85-year-old man for 19 years. This 85-year-old man suffers from schizophrenia, Parkinson's disease, and cannot walk. He has been to hospices on two occasions, but has returned to Licensee's care. Because of his schizophrenia, changes in his life are detrimental to him. Licensee has promised him that he may live with her until he dies.²

3. Licensee has also cared for a 65-year-old man for nearly 10 years. This 65-year-old man suffers from polio and wears leg braces. He also suffers from an explosive personality disorder that is controlled by prescription medication. This man has family and friends that visit him. He tells Licensee daily that he considers Licensee's home to be "paradise."³

4. Licensee considers the two men in her care to be her family. Licensee provides room and board for these men and ensures that all of their needs are met with supervision, security and stability.⁴

5. Licensee's husband, Darrel Ray, has been living in the home for the past 10 years, has been a substitute caregiver and has helped Licensee care for the two men in her care. Prior to Mr. Ray moving into the home in 2000, he was cleared on a background study by the County and was cleared by the County on four subsequent background studies.⁵

6. Prior to July 1, 2009, Hennepin County conducted all background checks on County licensees and all residents of licensed homes in the County to determine if they had committed any acts or crimes that would disqualify them from access to residents of licensed programs. On July 1, 2009, the Department took over all background studies. The Department has access to databases that the County did not.⁶

7. As a result of Mr. Ray's sixth background study, the first by the Department, it was revealed that Mr. Ray had been convicted of felony first-degree robbery on June 1, 1992 in Spokane County, Washington. This conviction is the equivalent of aggravated robbery in Minnesota.⁷

8. On May 11, 2009, the Department sent Mr. Ray a letter notifying him of the disqualification from direct contact with or access to persons served by the Department. In addition, the letter states:

It has been determined that you pose a risk of harm to persons served by the program that requires you to be under continuous, direct supervision

² Test. of J. Porrazzo.

³ *Id.*

⁴ *Id.*

⁵ *Id.*; Test. of M. Kalpiers.

⁶ Test. of M. Kalpiers.

⁷ *Id.*; Ex. 3; Minn. Stat. § 609.245.

whenever persons served by the program are present. Therefore, you are required to be within sight or hearing of another adult caregiver. In addition, you must provide the license holder with a copy of this letter. You must also tell the license holder that you are requesting reconsideration of your determination.⁸

Mr. Ray and Licensee followed the directive stated above. Mr. Ray requested reconsideration of the disqualification decision in a timely manner.⁹

9. On May 31, 2010, Mr. Ray moved out of the home and moved in with Licensee's adult daughter, who lives approximately one mile from Licensee's home.¹⁰ Mr. Ray's personal property resides with him at Licensee's daughter's home. His driver's license bears his residence address: Licensee's daughter's home.¹¹

10. Licensee had the locks at her home changed on June 5, 2010. Mr. Ray does not have a key to Licensee's home. Mr. Ray has had no access to Licensee's home or its residents since June 4, 2010.¹²

11. Since moving out of Licensee's home on May 31, 2010, Mr. Ray has not returned there and has had no contact with Licensee's two residents since that time.¹³ Mr. Ray has no plans or intention to return to Licensee's home while the two residents are in Licensee's care.¹⁴

12. Licensee and her husband meet at her daughter's home or elsewhere when a qualified substitute caregiver is caring for the two men at her home.¹⁵

13. Licensee is confident that her husband will not attempt to gain access to her home or its residents because she is convinced that he respects the fact that he cannot have any access to the residents and because she is convinced that he loves her enough to stay away.¹⁶

14. Although the decision for Mr. Ray to move out of the home was difficult and the separation is an inconvenience, both Licensee and Mr. Ray fully understand that it is necessary and will continue to do what is necessary to abide by the disqualification requirements.¹⁷

⁸ Ex. 3.

⁹ Test. of J. Porrazzo, Darrel Ray, and M. Kalpiers; Ex. 4.

¹⁰ *Id.*

¹¹ Test. of D. Ray.

¹² *Id.*; Test. of J. Porrazzo.

¹³ *Id.*

¹⁴ Test. of D. Ray.

¹⁵ *Id.*; Test. of J. Porrazzo.

¹⁶ Test. of J. Porrazzo.

¹⁷ *Id.*; Test. of D. Ray.

15. The County has no evidence of any violations of law or rule by Licensee.¹⁸

16. It is in the best interests of Licensee's two residents that they remain in her care.¹⁹

Procedural Findings

17. On October 13, 2010, the Department issued to Mr. Ray its reconsideration decision, advising him that it cannot to set aside his disqualification or issue a variance, and that the permanent disqualification decision is final. The letter also stated:

You are now ordered immediately removed from any position allowing direct contact with, or access to, (as those terms are defined under Minnesota Statutes, section 245C.02) persons receiving services from the program.²⁰

18. On October 13, 2010, the Department issued to Licensee an Order of Revocation of her license to provide adult foster care. The reason stated for the revocation is:

Because an individual subject to a background study is disqualified from any position allowing direct contact with, or access to, persons served by DHS-licensed programs, and in order to protect the health, safety, and rights of children receiving services in DHS-licensed programs, your license to provide adult foster care is revoked.²¹

19. Licensee does not and has not provided services to children receiving services in DHS-licensed programs.²²

20. Licensee filed a timely appeal from the order of Revocation and requested an appeal hearing pursuant to Minn. Stat. § 245A.07.²³

21. On October 20, 2010, the Department executed a Notice of and Order for Hearing scheduling a contested case hearing on January 5, 2011.²⁴

22. On December 10, 2010, an Administrative Law Judge issued a Protective Order, which was served upon the parties by mail on December 10, 2010.²⁵

¹⁸ Test. of M. Kalpiers.

¹⁹ *Id.*

²⁰ Ex. 5.

²¹ Ex. 1.

²² Test. of J. Porrazzo.

²³ Notice and Order for Hearing.

²⁴ *Id.*

²⁵ Protective Order.

23. These Conclusions are reached for the reasons set forth in the Memorandum below, which is hereby incorporated by reference into these Conclusions.

24. The Administrative Law Judge adopts: as Findings any Conclusions that are more appropriately described as Findings; and as Conclusions any Findings that are more appropriately described as Conclusions.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Human Services and the Administrative Law Judge have jurisdiction to consider this matter.²⁶

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. Minn. Stat. § 245A.07, subd. 3, allows the Commissioner to suspend or revoke a license, or impose a fine if a license holder fails to comply with the applicable laws or rules. Notice of any such action must be given by certified mail and must state the reasons for the sanction.

4. Under Minn. Stat. § 245A.08, subd. 3, the burden of proof first lies with the Commissioner, who may demonstrate reasonable cause for the action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule. If the Commissioner demonstrates that reasonable cause existed, the burden shifts to the license holder to demonstrate by a preponderance of the evidence that she was in full compliance with those laws or rules allegedly violated, at the time that the Commissioner alleges the violations occurred.

5. Minn. Stat. § 245C.03, subd. 1(2) requires that background studies be conducted regarding “an individual age 13 and over living in the household where the licensed program will be provided.”

6. Minn. Stat. § 245C.15, regarding **DISQUALIFYING CRIMES OR CONDUCT**, provides in applicable part:

Subdivision 1. **Permanent disqualification.** (a) An individual is disqualified under section 245C.14 if: (1) regardless of how much time has passed since the discharge of the sentence imposed, if any, for the offense; and (2) unless otherwise specified, regardless of the level of the offense, the individual has committed any of the following offenses: sections . . . 609.245 (aggravated robbery); . . .

²⁶ Minn. Stat. §§ 245A.07, subd. 3; 245A.08, subd. 2a (a); 245C.28, subd. 1; 14.50.

7. Darrel Lee Ray was convicted of an offense equivalent to one listed in Minn. Stat. § 245C.15 and is therefore permanently disqualified from having direct contact with individuals being cared for by Licensee, as required by Minn. Stat. § 245C.14.

8. Minn. Stat. § 245C.24, regarding **DISQUALIFICATION; BAR TO SET ASIDE A DISQUALIFICATION; REQUEST FOR VARIANCE**, provides in applicable part:

Subd. 2. **Permanent bar to set aside a disqualification.** (a) Except as provided in paragraph (b), the commissioner may not set aside the disqualification of any individual disqualified pursuant to this chapter, regardless of how much time has passed, if the individual was disqualified for a crime or conduct listed in section 245C.15, subdivision 1.

9. The Commissioner may neither set aside Mr. Ray's disqualification nor grant Licensee a variance because of Minn. Stat. § 245C.24, subd. 2 (a).

10. Minn. Stat. § 245A.07, subd. 1, requires the Commissioner to consider "the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights" of those persons in a licensee's program before applying sanctions under Minn. Stat. § 245A.07.

11. The Commissioner has advanced evidence establishing reasonable cause to believe that, prior to issuing its Order of Revocation, Licensee allowed a disqualified individual to remain a resident in the household, resulting in a violation of Minn. Stat. §§ 245A.07 and 245C.14.

12. Licensee has failed proved by a preponderance of the evidence that she was in compliance with Minn. Stat. §§ 245A.07 and 245C.14 prior to June 5, 2010.

13. Licensee has proved by a preponderance of the evidence that she was in compliance with Minn. Stat. §§ 245A.07 and 245C.14, and did comply with the law by removing Mr. Ray from residence in the home on May 31, 2010, changing the locks on the residence on June 5, 2010, and that Mr. Ray was not a resident in the home after May 31, 2010, and had no access to the home or its foster care residents after June 5, 2010, all as required by 245C.14 and the Department's directives.

14. Minn. Stat. § 245A.04 provides in applicable part:

Subd. 6. **Commissioner's evaluation.** Before issuing, denying, suspending, revoking, or making conditional a license, the commissioner shall evaluate information gathered under this section. The commissioner's evaluation shall consider facts, conditions, or circumstances concerning the program's operation, the well-being of

persons served by the program, available consumer evaluations of the program, and information about the qualifications of the personnel employed by the applicant or license holder. The commissioner shall evaluate the results of the study required in subdivision 3 and determine whether a risk of harm to the persons served by the program exists. In conducting this evaluation, the commissioner shall apply the disqualification standards set forth in chapter 245C.

15. As provided in Minn. Stat. §§ 245A.04, subd. 6 and 245C.16, the County and the Department considered only the disqualification of Mr. Ray and the fact that Licensee and Mr. Ray are married. Neither the County nor the Department considered any other facts or the conditions and circumstances of the program. The County and the Department did not consider available consumer evaluations of the program, the best interests of the foster care residents, the value of continuity of care and the overall well being of the two men in Licensee's care. The Commissioner evaluated the results of the background study for Mr. Ray and applied the disqualification standards set forth in chapter 245C without regard to the fact that Mr. Ray was no longer a resident in the home after May 31, 2010 and had no access to the home or its foster care residents after June 5, 2010.

16. It would not be in the best interests of the two disabled men living in Licensee's home to relocate to another foster home.²⁷ These two men would be harmed by the revocation of Licensee's license by causing them to lose the stability and security of their long-term home.²⁸

17. If the Commissioner finds that a license holder has failed to comply with applicable law or rule and the failure does not imminently endanger the health, safety, or rights of the persons served by the program, the Commissioner may issue an order of conditional license, or revoke or suspend the license. When determining the appropriate sanction, the Commissioner "shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program."²⁹

18. The following factors are to be considered:

- a. the laws or rules that have been violated;
- b. the nature and severity of each violation, and whether it was recurring or nonrecurring;
- c. the effect of the violation on persons served by the program;
- d. the risk of harm to persons served;
- e. any evaluations of the program by persons served or their families;

²⁷ Finding 16.

²⁸ Findings 2-4.

²⁹ Minn. Stat. § 245A.07, subd. 1 (a).

- f. other relevant facts, conditions and circumstances concerning the operation of the program, including reports from other regulatory agencies, or complaints;
- g. relevant information about the qualifications of the license holder or persons living in the residence; and
- h. any aggravating or mitigating factors related to the violation.³⁰

19. The Department considered only the first two factors above. The Department did not consider: the effect a revocation would have on the residents; any evaluations by or desires of the residents or their families; any other relevant facts or information; or mitigating factors related to the violation. There are no aggravating factors.³¹

20. The Department failed to demonstrate that the nature, chronicity, or severity of the violation of law, and the effect of the violation on the health, safety, or rights of persons served by the program, warranted revocation of the Respondent's license.

21. Minn. Stat. § 245A.06, subd. 1., concerning **Correction Orders and Conditional Licenses** provides in relevant part:

(a) If the commissioner finds that the applicant or license holder has failed to comply with an applicable law or rule and this failure does not imminently endanger the health, safety, or rights of the persons served by the program, the commissioner may issue a correction order and an order of conditional license to the applicant or license holder. When issuing a conditional license, the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.

22. Mr. Ray's presence in Licensee's home during the period from May 11, 2010 to May 31, 2010, while the Department was considering Mr. Ray's request for reconsideration of his disqualification was in full compliance with the Department's May 11, 2010 directive regarding supervision of Mr. Ray and did not imminently endanger the health, safety, or rights of men served by the Licensee.

23. These Conclusions are reached for the reasons set forth in the Memorandum below, which is hereby incorporated by reference into these Conclusions.

24. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions, and as Findings any Conclusions that are more appropriately described as Findings.

³⁰ Minn. R. 9543.0100, subp. 1. See *also* Minn. R. 9543.0040, subp. 5, item C.

³¹ Minn. Stat. § 245A.07, subd. 3; Minn. R. 9543.0100, subp. 3.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends to the Commissioner of Human Services that the revocation of the adult foster care license of Ms. Julianna Porrazzo be withdrawn and rescinded.

Dated: February 3, 2011

s/M. Kevin Snell

M. KEVIN SNELL
Administrative Law Judge

Reported: Digitally recorded; no transcript prepared.

NOTICES

This report is a recommendation, not a final decision. The Commissioner of Human Services will issue a final decision after reviewing the administrative record, and she may adopt, reject or modify the Administrative Law Judge's Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this recommended decision in which to file any exceptions to the report with the Commissioner.³² Parties should contact the office of Lucinda Jessen, Commissioner of Human Services, Box 64998, St. Paul MN 55155, (651) 431-2907 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minnesota law, the Commissioner of Human Services is required to serve her final decision upon each party and the Administrative Law Judge by first-class mail.

³² Minn. Stat. § 14.61.

MEMORANDUM

Disqualification of Darrel Ray

The disqualification of Mr. Ray itself is not an issue in this proceeding. Neither he nor the Licensee contest that the permanent disqualification determination is final. The only issue to be determined in this proceeding is whether or not Licensee's adult foster care license should be revoked because of Mr. Ray's disqualification.

Licensee's Adult Foster Care License

The Commissioner presented the testimony of the County Unit Supervisor and documentary evidence to establish that Licensee had, although unknown to her, allowed a disqualified individual to reside in the foster care home and help care for the two foster care residents for 10 years. Although the County had completed five background studies that did not reveal Mr. Ray's disqualifying crime and conviction, nevertheless, the Commissioner has established that reasonable cause exists to believe that a licensing sanction would be appropriate.

The Licensee has proved by a preponderance of the evidence that her husband moved out of the home four and a half months prior to the time the Department required that he be permanently removed. Although there is no evidence that Licensee knew of her husband's robbery conviction prior to May 11, 2010, Mr. Ray, nevertheless, was a disqualified individual living in the foster care home and had direct access to its residents. Indeed, he was a substitute caregiver and routinely cared for the two men over a ten-year period. Having a disqualified individual care for individuals in a Department licensed program is a violation of the law. Notwithstanding the fact that the evidence suggests that Mr. Ray presents no actual risk of harm to the two men in Licensee's care, the permanent disqualification law allows no discretion to the Commissioner to set aside the disqualification or grant a variance.

The only way for Licensee to maintain her license and care for the two men in her "family" is to do what she has done: require that her husband reside somewhere other than the foster care home and have no contact with her residents.

Mr. Ray's immediate removal on May 31, 2010, and the changing of the locks of the home on June 5, 2010, returned Licensee to full compliance with the law on June 5, 2010.

The Department has no evidence of any other violation of law or rule. Considering the complete lack of chronicity of violations of rule or law during 25 years of adult foster care and the fact that the health, safety, and rights of the men in Licensee's program are best served by Licensee being able to continue to care for them, neither revocation nor suspension of Licensee's license would be reasonable.³³ If the Commissioner believes that a sanction is necessary for Licensee's unknowing violation

³³ Minn. Stat. § 245A.07, subd. 1.

of the disqualification law prior to May 11, 2010, a Conditional License placing reasonable restrictions on Licensee's license would be appropriate.³⁴

The only reason given by the County for the revocation was:

Even though Darrel Ray has moved out of Julianna's house, they are still married, and it would be difficult to ensure that Mr. Ray never has contact with the AFC residents.³⁵

That reason has no basis in either law, rule or fact. The fact of marriage alone does not reasonably lead to the conclusion that either Licensee or Mr. Ray will violate the requirements of the law. Both Licensee and Mr. Ray have given their assurances, under oath, that they will not allow Mr. Ray access to Licensee's foster care residents. They were both credible witnesses: calm; matter of fact; and testified without hesitation or evasion, and without any indications of deceit. They both acknowledged the difficulties involved in their living situations. However, they are mature individuals, resigned to the facts and law, and willing to place the welfare of two long-term, elderly, disabled men over their own convenience.

A substantial mitigating factor is that there is no factual evidence in the record to indicate that health, safety, or rights of the adult men in Licensee's care were or are in any danger from Mr. Ray at any time. The best interests and well being of the two residents will be best served by their continuing care by Licensee.³⁶

For these reasons, the Administrative Law Judge recommends that the Order of Revocation be rescinded.

M. K. S.

³⁴ Minn. Stat. § 245C.30

³⁵ Ex. 6.

³⁶ Findings 2-4, 15-16.